Supreme Court, U.S.
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No. 86-2003

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DONALD BRAUNER - - - - - Petitioner

versus

MITCH McCONNELL, et al. - - - Respondents

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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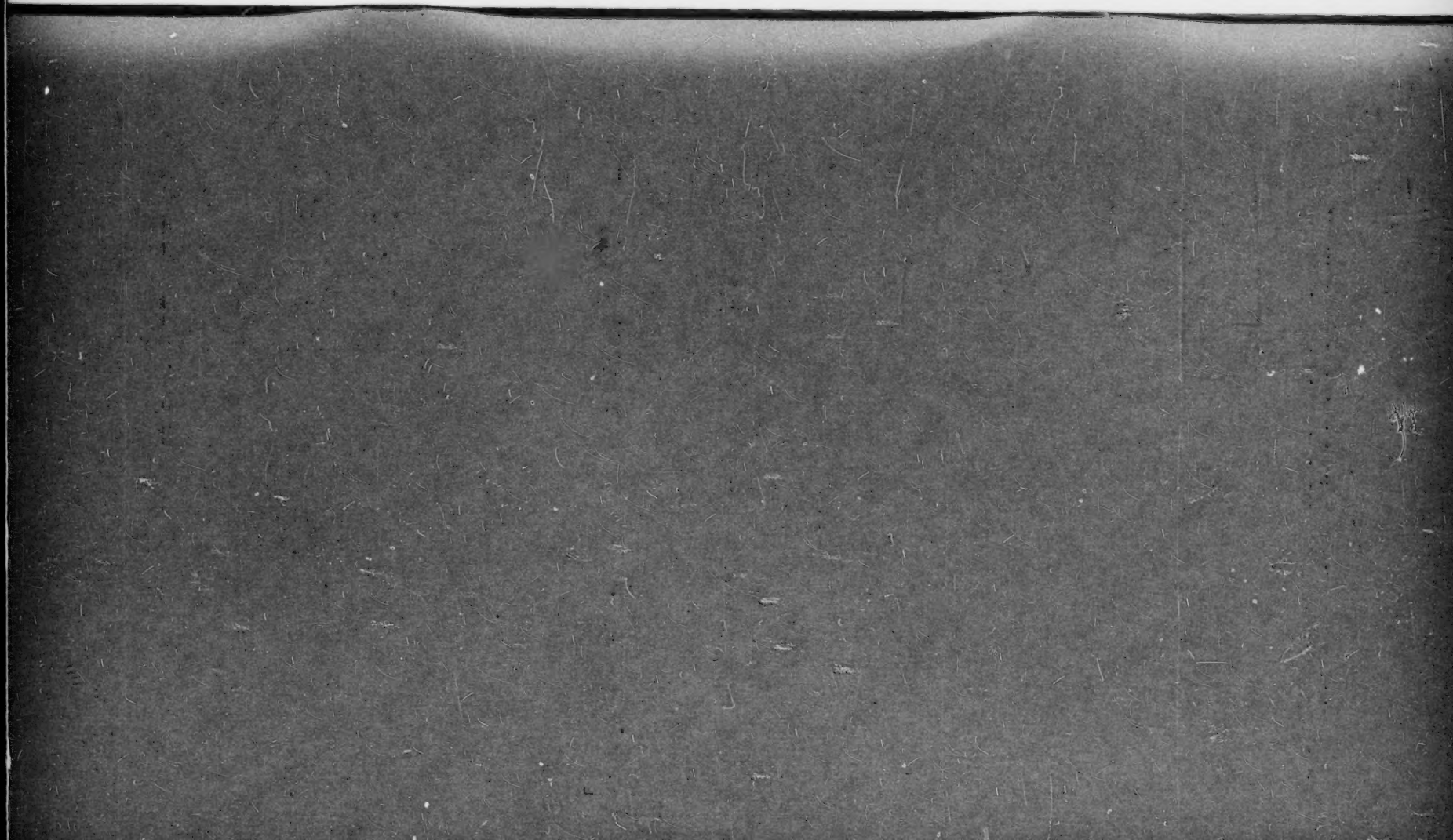

QUESTIONS PRESENTED

Does § 504 of the Rehabilitation Act (29 U.S.C.S. § 794) apply to involuntary incarceration wherein the inmate voluntarily motions the sentencing court to incarcerate him in a specific detention facility, and is involuntary incarceration, *per se* a program or activity for which an inmate is "otherwise qualified"?

LIST OF ALL PARTIES TO THE PROCEEDING

DONALD BRAUNER
Apartment 6, Angora Court
Louisville, Kentucky 40206 ..... *Plaintiff*

MITCH MCCONNEL, individually and as
County Judge Executive and
Jefferson Fiscal Court;

DARRELL OWENS,
SYLVIA WATSON, and
JIM "POP" MALONE, individually and as
members of the Jefferson Fiscal Court;

JEFFERSON COUNTY DEPARTMENT OF CORRECTIONS,
Hall of Justice, Louisville, Kentucky;

RICHARD FREY, individually and as
Director of the Jefferson County
Department of Corrections;

MAJOR JOHN SKOWERS, individually and as
Director of the Jefferson County
Community Treatment Center;

and

JEFFERSON COUNTY, KENTUCKY ..... *Defendants*

TABLE OF CONTENTS

	PAGE
Questions Presented	i
List of All Parties to the Proceeding	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Statutes and Regulations Involved	1– 2
Statement of the Case	2– 6
Argument in Opposition to Writ of Certiorari	6–16
Conclusion	16–17
Appendix	1a–8a

TABLE OF AUTHORITIES

Cases Cited: PAGE

Alexander v. *Cohate,* 469 U. S. —, 106 S. Ct. 712, 83 L. Ed. 2d 661 (1985) 16

Doe v. *New York University,* 666 F. 2d 761 (2nd Cir. 1981) 7

Flowers v. *Webb,* 575 F. Supp. 1450 (E.D. N.Y. 1983) 8

Gallagher v. *Pontiac School District,* 807 F. 2d 75 (6th Cir. 1986) 13

Journey v. *Vitek,* 685 F. 2d 239 (8th Cir. 1982)..... 9,10

Kentucky Ass'n for Retarded Citizens v. *Conn,* 510 F. Supp. 1233 (W.D. Ky. 1980) 15

Lowrence v. *Scully,* 575 F. Supp. 39 (S.D. N.Y. 1983) 11

Stites v. *McKenzie,* 423 F. Supp. 1190 (W.D. W.Va. 1976) 12

Southeastern Community College v. *Davis,* 442 U. S. 397, 99 S. Ct. 2361, 60 L. Ed. 2d 908 (1979) 10

United States Department of Transportation v. *Paralyzed Veterans of America,* 477 U. S. 106 S. Ct. 2705, 91 L. Ed. 494 (1976) 6

Statutes Cited—Federal:

28 U.S.C. § 1331 2

28 U.S.C. § 1343 2

29 U.S.C. § 701 7

29 U.S.C. § 706 .....2, 7, 8

29 U.S.C. § 794 .....1, 2, 7, 14, 15

29 U.S.C. § 796 15

29 U.S.C. § 796(a)a 15

42 U.S.C. § 1983 .....4a, 6a

Statutes Cited—Kentucky:

K.R.S. 196B.260 ..... 4a

No. 86-2003

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DONALD BRAUNER - - - - - *Petitioner*

v.

MITCH MCCONNELL, et al. - - *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The bench order of the United States Court of Appeals is unreported and is printed in Appendix A hereto, *infra,* page 1a. The opinion of the United States District Court is printed in Appendix A hereto, *infra,* page 4a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 13, 1987. This Court has jurisdiction under 28 U.S.C.A. § 1254 (1).

STATUTES AND REGULATIONS INVOLVED

This case involves 29 U.S.C.S. § 794 (1982), which provides as follows:

> No otherwise qualified handicapped individual in the United States, as defined in section 7(7) [29 USC § 706(7)], shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees. 29 U.S.C. § 794.

STATEMENT OF THE CASE

This action is based upon Section 504 of the Rehabilitation Act of 1973, as amended [29 U.S.C. § 794]. Federal Jurisdiction is alleged upon 28 U.S.C. §§ 1331 and 1343.

Donald Brauner (hereinafter referred to as "Plaintiff"), is a paraplegic at approximately T-7, and has been since January 7, 1977 [Brauner Deposition p. 6]. He claims that facilities of the Jefferson County Corrections Department were not accessible to him dur-

ing his incarceration because of his confinement to a wheelchair.[1]

Plaintiff was sentenced by the Jefferson County District Court, Louisville, Kentucky, on August 11, 1983, to serve an eleven (11) month sentence for two (2) counts of Driving under the Influence of Alcohol, two (2) counts of Terroristic Threatening, and Resisting Arrest at the Jefferson County Corrections Department.

Plaintiff presented himself for incarceration on August 15, 1983, at the Hall of Justice, and was placed in a maximum security single cell. On August 16, 1983, following completion of intake processing, Plaintiff was transferred *pursuant to his request to the sentencing Court on August 11, 1983,* to the Community Treatment Center, [Brauner Deposition, p. 23], where he was released every other day to go home and personally attend his hygiene needs until his early release from custody on September 23, 1983, by Court Order.

Plaintiff also alleged that he could not adjust his catheter while incarcerated which resulted in an infection and scarring of his foreskin, but waited after his release from custody from September 23, 1983 until December 15, 1983, to seek medical advice. He

[1]For purposes of clarity, the facilities of the Jefferson County Corrections Department at issue are the Hall of Justice, 600 West Jefferson Street, Louisville, Kentucky, and the Community Treatment Center, 316 East Chestnut Street, Louisville, Kentucky. Construction for the Hall of Justice was completed in 1976, and the facility is air conditioned and barrier free. Construction for the Community Treatment Center was completed in approximately 1939.

also claims that he was denied professional services to care for infections, but admits to being treated in jail medical personnel during his incarceration.

Plaintiff filed his Complaint on June 19, 1984, a First Amended Complaint was filed on August 2, 1984, adding Jefferson County as a Defendant, and a Second Amended Complaint was filed on April 24, 1985.

Plaintiff's deposition was taken on November 15, 1984. Theodore E. Brauner, Plaintiff's father's, and the Honorable Danny Karem's depositions were taken on March 22, 1985. Richard A. Frey's and Dorothy A. Hagan's depositions were taken on April 1, 1985.

Plaintiff's Motion for Partial Summary Judgment with supporting memorandum was filed February 7, 1986. Defendants filed a motion to dismiss for failure to state a claim and a motion for summary judgment on March 14, 1986. Plaintiff filed a reply brief on March 19, 1986.

On March 25, 1986, the trial court granted Defendants' Motion for Summary Judgment and ordered Plaintiff's claim dismissed with prejudice. The Sixth Circuit Court of Appeals affirmed on March 13, 1987, with an issuance of mandate on May 14, 1987.

The most significant fact which must be recognized is that the Plaintiff was a prisoner, sentenced to serve eleven (11) months, and moved the sentencing Court, with assistance of counsel, on August 11, 1983 to incarcerate him in a particular correctional facility, as opposed to allowing the correctional officials to determine the best institution for his incarceration given

the nature of Plaintiff's medical condition. (Deposition Brauner, p. 23). Plaintiff also presents a ridiculous scenario wherein he claims to have sustained a cut to his penis on or about September 9, 1983, wherein he states that he was released from custody on yet not sought medical attention from the date of his release on September 23, 1983, until December 15, 1983. (Brauner Deposition p. 69).

Plaintiff also suggests that he had sustained a urinary tract infection during his incarceration—however, what Plaintiff fails to state is that urinary tract infections are common among paraplegics and quadraplegics and that he has had such infections in the past (Brauner Deposition p. 66-67). Plaintiff admits during his incarceration, that he had received medication for his urinary tract infection (Brauner Deposition p. 71).

Plaintiff gives the impression that his wheelchair was continuously denied him during his incarceration. This is, as a matter of fact, clearly untrue. Plaintiff's wheelchair was separated from him only for a matter of hours on August 15 and 16, 1983, during his incarceration at the Hall of Justice's Maximum Security Intake Processing Area. Plaintiff, at the time his wheelchair was removed from him, was informed of the security reasons for the removal of the wheelchair (Brauner Deposition, p. 14).

The last allegation, which Plaintiff stretches ones credulity, is that he was forced to empty his urine bag on the floor because he could not reach the commode,

but he could reach the wash basin. This appears by itself to be a contradiction since the wash basin and the commode are integral parts of one another. To reach one is to reach the other (Brauner Deposition, pp. 12, 19-20), (Frey Deposition, Exhibit Number Three—eight photographs).

Plaintiff also contends that the Corrections Department received over $2.5 million dollars in federal grants from 1978 through 1985—this is a clear misstatement of fact. The Defendants did receive federal funding from 1978 to 1982. (Frey Deposition, Exhibit Number One). As the exhibit clearly indicates, no Federal financial assistance was received by the Jefferson County Corrections Department during August and September, 1983, the period of Plaintiff's incarceration.

ARGUMENT IN OPPOSITION TO WRIT OF CERTIORARI

Plaintiff's primary claim for relief is premised upon the Rehabilitation Act of 1973, as amended [29 U.S.C. § 794]. The Supreme Court's first analysis of § 504 was in *Southeastern Community College* v. *Davis,* 442 U. S. 397, 99 S. Ct. 2361, 60 L. Ed. 2d 980 (1979) which denied a bilateral, sensori-neural individual admission to a nursing program. "The starting point of any inquiry into the applicability of a statute is the language of the statute itself." *United States Department of Transportation* v. *Paralyzed Veterans of America,* 477 U. S. —, 106 S. Ct. 2705, 91 L. Ed. 2d 494, 502 (1976) citations omitted.

Section 504 states in pertinent part that:

> No otherwise qualified handicapped individual in the United States, as defined in section 7(7) [29 U.S.C. § 706(7)], shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. 29 U.S.C. § 794.

Congress' declaration of purpose for the Rehabilitation Act of 1973 is ". . . to develop and implement, through research, training, services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent living." 29 U.S.C. § 701.

Plaintiff Is Not an "Otherwise Qualified Handicapped Individual" Nor is Involuntary Incarceration a "Program or Activity".

In order to make out a case based on a violation of § 504 a plaintiff must prove (1) that [he] . . . is a 'handicapped person' under the Act, (2) that [he] . . . is 'otherwise qualified' for the position sought, (3) that [he] . . . is being excluded from the position solely by reason of [his] . . . handicap, and (4) the position exists as part of a program or activity receiving Federal financial assistance. *Doe* v. *New York University,* 666 F. 2d 761, 774-75 (2nd Cir. 1981).

Under § 504, the term:

> 'Handicapped individual' means, for purposes of titles IV and V of this Act [29 USCS §§ 780 *et seq.*, 790 *et seq.*], any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having impairment. For purposes of section 503 and 504 [29 USCS §§ 793, 794] as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others. 29 U.S.C. § 706 (7)(B).

Plaintiff does not satisfy the second element of *Doe* —"otherwise qualified."

The trial court concluded, "nor are we willing to hold that a prisoner is an otherwise qualified handicapped individual." [R. 29 Memorandum at p. 3].

> Here, the plaintiff seeks to have the [Defendants] . . . provide [him] . . . with the placement and care appropriate to a [paraplegic] . . . individual *because* [he] . . . is handicapped—not *in spite of* [his] . . . handicap. Thus, the second criteria of the *Doe* test that plaintiff established [he] . . . is 'otherwise qualified' in spite of [his] . . . handicap for state care and treatment, cannot be met in this instance. *Flowers* v. *Webb,* 575 F. Supp. 1450, 1456 (E.D. N.Y., 1983).

Plaintiff also fails to satisfy the third requirement of *Doe,* in that he has not been excluded from the participation in, nor denied the benefits of, nor subjected to discrimination solely by reason of his handicap.

Plaintiff specifically moved the sentencing court on August 11, 1986 to incarcerate him at the Community Treatment Center.

> Q. 79. Now, you requested to be housed at the Community Treatment Center, is that correct?
>
> A. Yes, sir.
>
> Q. 80. And you could have remained at the Hall of Justice facility?
>
> A. Yes, sir.
>
> Q. 81. . . . it was not your first time you had been in the Hall of Justice facility, was it?
>
> A. No, sir.
>
> Brauner Deposition p. 23.

Plaintiff is estopped to complain that, when granting his motion for incarceration in a specific correctional facility, he has encountered accommodations which do not meet his approval. A closely analogous factual situation is that found in *Journey* v. *Vitek,* 685 F. 2d 239 (8th Cir. 1982). Journey was housed in a prisoner infirmary unit located on the second floor of a building. Due to a lack of ramps he could not negotiate the stairs without assistance from other persons, inmates included. Following a three (3) day trial, the court concluded that:

> Viewing the evidence as a whole, I conclude that there has been no exclusion of the plaintiff from participation in or denial of benefits or subjection to discrimination under any program or activity of the Department of Correctional Services as related to Victor Journey . . . I find that Victor Journey has not been excluded from participation in any program or activity, has not been denied the benefits of any program or activity, and has not been subjected to discrimination under any program or activity of the Nebraska Department of Correctional Services. For the most part . . . the prison personnel have afforded [Journey] access to the activities in which he had interest, nearly as often as he wanted to participate. *Journey* v. *Vitek*, 685 F. 2d 239, 242 (8th Cir. 1982).

If the Plaintiff has experienced any difficulty following transfer at his request to a particular institution, he was not the subject of discrimination "solely by reason of his handicap," but by his own request. Plaintiff fails to satisfy the third element of *Doe* which is exclusion based solely upon handicap.

In *Southeastern Community College* v. *Davis,* 442 U. S. 397, 405, 99 S. Ct. 2361, 2366, 60 L. Ed. 2d 980, 982 (1979), the court held:

> Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate. Instead, it requires only that an 'otherwise qualified handicapped individual' not be excluded from participation in a fed-

> erally funded program *'solely by reason of his handicap,'* indicating only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context. (emphasis added).

No assumptions were made concerning Plaintiff's participation in any program or activity, his access was equal to all other inmates. He specifically asked for the particular placement, made no attempt during his incarceration to request another transfer to a more appropriate facility, and enjoyed the benefits of placement at the Community Treatment Center.

In *Lowrence* v. *Scully,* 575 F. Supp. 39 (S.D. N.Y. 1983) the issue was raised concerning the removal of a wheelchair from an incarcerated person. Plaintiff would give the impression that during his entire incarceration, he was denied the wheelchair (Plaintiff Appellant Brief, p. 4). This is clearly misstatement of fact. Plaintiff acknowledges that he was told of the security reasons for the removal of his wheelchair, [Brauner Deposition, p. 14], and also states by deposition that the wheelchair was removed shortly after his arrival at the Hall of Justice on August 15, 1983, and returned to him at the time of his transfer from the maximum security intake area of the jail to the Community Treatment on August 16, 1986 [Brauner Deposition, p. 13]. Legitimate security reasons existed for the brief, temporary removal of Plaintiff's wheelchair during his confinement in a maximum security intake processing area.

Plaintiff's reliance upon *Stites* v. McK*enzie,* 423 F. Supp. 1190 (W.D. W.Va. 1976) is also misplaced. Stites was a seventy-six (76) year old mentally ill inmate who had spent a majority of his life incarcerated in either a mental institution or a prison. Stites was denied access to vocational rehabilitation pursuant to state law because of his mental illness. *Id.,* at 1192. It was this exclusion based upon state law which the court found to be in violation of § 504. No exclusion from a specific program or activity based upon state law exists in this instance.

Plaintiff's claim fails to satisfy the fourth element of *Doe,* in that the court erred in concluding that the Defendant, Jefferson County Corrections Department was a recipient of Federal financial assistance during the period of Plaintiff's incarceration. Plaintiff gives the impression that the Defendants were recipients of Federal financial assistance from 1978 to 1985. These are merely the years for which an accounting to Plaintiff was made. The record [Frey Deposition, Exhibit Number One (1)] clearly indicates that no Federal financial assistance was received after the 1981-82 fiscal year which ended June 30, 1982. Plaintiff's incarceration was during August and September of 1983. The trial court's factual finding of funding is not supported by evidence in the record. (R. 29: Memorandum p. 5, n. 2). Frey's acknowledgement of Federal funding [Frey Deposition, p. 5], was not an acknowledgement to any particular period of funding, only

that he was familiar with the various federal grants received by the agency in prior years.

The Sixth Circuit in *Gallagher* v. *Pontiac School District,* [807 F. 2d 75, 80-81 (6th Cir. 1986)], has held that:

> "The Supreme Court has not ruled on this precise § 504 issue. We find, however, that the program-specific approach is most consistent with the Supreme Court and Sixth Circuit rulings in the Title IX context, which is closely analogous to § 504 in both language and underlying policy. The relevant language of Title IX reads:
>
> > 'No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance.' 20 U.S.C. § 1681(a) (emphasis added.)

The Plaintiff never applied for, nor participated in a program receiving Federal Financial Assistance.

The court went on to say:

> "The overwhelming similarity of these quoted passages is no accident. Congress expressly modeled the discrimination prohibition contained in Section 504 after the prohibitory language contained in Title VI and Title IX" *Brown* v. *Sibley,* 650 F. 2d at 768.
>
> The Supreme Court has ruled that "an agency's authority under Title IX . . . is subject to the *program-specific* limitations of §§ 901 and 902" See *Grove City College* v. *Bell,* 465 U. S. 555, 570,

> 104 S. Ct. 1211, 1220, 79 L. Ed. 2d 516 (1984) (quoting *North Haven Bd. of Educ.* v. *Bell,* 456 U. S. 512, 538, 102 S. Ct. 1912, 1926, 72 L. Ed. 2d 299 (1982) (emphasis added). We have also expressly rejected the institution-wide "ripple effect" reasoning asserted in *Wright.*
>
> We do not believe that Congress intended, in enacting Title IX, to authorize [regulation of] entire colleges and universities because federal money benefits the entire institution . . . [P]rovided that the 'program-specific' limitation in Title IX is met, [Hillsdale] is subject to regulation. *Hillsdale College* v. *Dept. of Health, Educ. & Welfare,* 696 F. 2d 418, 429-30 (6th Cir. 1982) (footnote omitted).
>
> Because Title IX is closely analogous to § 504, the precedent cited indicates a similar rule with respect to § 504. We therefore adopt a program-specific approach, and dismiss Gallagher's § 504 claim because he never sought to participate in any particular program that received federal financial assistance.

Defendants are not recipients of Federal financial assistance during the period Plaintiff was incarcerated and therefore not susceptable to § 504 coverage.

Plaintiff also relies upon the phrase "independent living." This phrase has absolutely no application to § 504 (29 U.S.C. § 794) or to an incarcerated individual, but applies only to instances where the person is functioning in the family unit or in the community:

> For purposes of this title [29 USCS §§ 796 *et seq.*], the term "comprehensive services for independent

> living" means any appropriate vocational rehabilitation service (as defined under title I of this Act [29 USCS §§ 720 *et seq.*)] and any other service that will enhance the ability of a handicapped individual to live independently and function within his family and community and, if appropriate, secure and maintain appropriate employment. 29 U.S.C. § 796a(a) (1978).
>
> The purpose of this title [29 USCS §§ 796 *et seq.*] is to authorize grants (supplementary to grants for vocational rehabilitation services under title I [29 USCS §§ 720 *et seq.*]) to assist States in providing comprehensive services for independent living designed to meet the current and future needs of individuals whose disabilities are so severe that they do not presently have the potential for employment but may benefit from vocational rehabilitation services which will enable them to live and function independently. 29 U.S.C. § 796 (1978).

The term "independent living" has no application to Section 504 [29 U.S.C. § 794], but applies only to 29 U.S.C. § 796 *et seq.* Incarceration by design is a restriction upon the person's ability to live independently; ". . . Section 504 of that Act [Rehabilitation Act of 1973] does not include a legislative mandate for deinstitutionalization. *Kentucky Ass'n for Retarded Citizens* v. *Conn.,* 510 F. Supp. 1233, 1243 (W.D. Ky. 1980).

"Any interpretation of § 504 must therefore be responsive to two powerful but countervailing considerations—the need to give effect to the statutory objec-

tive and the desire to keep § 504 within manageable bounds." *Alexander* v. *Cohate,* 469 U. S. ——, 105 S. Ct. 712, 720, 83 L. Ed. 2d 661, 670 (1985). The trial court properly kept its decision within the bounds of *Alexander* by refusing to expand the concept of "program or activity" to include involuntary incarceration of convicted individuals or to conclude that an inmate is an "otherwise qualified handicapped individual."

CONCLUSION

The District Court properly held that it would ". . . do violence to the legislative intent of the Rehabilitation Act to expand it to include involuntary incarceration within the definition of a 'program or activity'." (R. 29: Memorandum, p. 3). Involuntary incarceration is a status and a result of a conviction for crime, it is not a "program or activity" envisioned by congress to warrant coverage by Section 504.

Secondly, the District Court was correct in its determination that a prisoner is not an "otherwise qualified handicapped individual." (R. 29: Memorandum, p. 3). The court's observation of "Otherwise qualified to do what?" (R. 29: Memorandum, p. 3) is precisely the question which the Plaintiff has never addressed.

The District Court's dismissal with prejudice and the Sixth Circuit Court of Appeals' affirmation should not be reviewed and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ALLEN P. DODD, III
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Attorneys for Defendants-Appellees

CERTIFICATE

I hereby certify that three (3) copies of the foregoing Defendants-Appellees Brief were hand-delivered to Mr. Richard M. Breen, Hargadon, Lenihan, Harbolt & Breen, 713 West Main Street, Louisville, Kentucky, 40202, this 21st day of October, 1987.

ALLEN P. DODD, III

APPENDIX

PAGE

Order Affirming Judgment, (3/13/87), U. S. Ct. Appeals, Sixth Circuit, *Brauner* v. *McConnell, et al.*, No. 86-5447 ..... 1a

Letter from Clerk, U. S. Ct. Appeals, Sixth Circuit, (5/14/87) 2a

Order Affirming Judgment, (3/13/87), Issued as Mandate, (5/14/87), U. S. Ct. Appeals, Sixth Circuit, *Brauner* v. *McConnell, et al.*, No. 86-5447 ..... 3a

Memorandum of Judge Thomas A. Ballantine, Jr., (3/25/87), U. S. District Court for the Western District of Kentucky at Louisville, *Brauner* v. *McConnell, et al.*, No. C 84-0652-L(B) 4a

Order of Judge Thomas A. Ballantine, Jr., (3/25/87), U. S. District Court for the Western District of Kentucky at Louisville, *Brauner* v. *McConnell, et al.*, No. C 84-0652-L(B) 8a

No. 86-5447

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DONALD BRAUNER, - - - - *Plaintiff-Appellant,*

v.

MITCH MCCONNELL, Et Al., - *Defendants-Appellees.*

ORDER — Filed March 13, 1987

Before: ENGEL, KRUPANSKY and GUY, Circuit Judges.

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

The Court finds that no prejudicial error intervened in the judgment and proceedings in the district court, and it is therefore ORDERED that said judgment be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

(s) Leonard Green
Leonard Green, Chief Deputy

[LETTERHEAD OF UNITED STATES COURT OF APPEALS]

May 14, 1987

Mr. Franklin Reid, Clerk
U. S. District Court
P.O. Box 756
Jackson, TN 38301

Re: Case No. 86-5447
Brauner v. McConnell
Dist. Ct. No. 84-0652

Dear Mr. Reid:

Enclosed please find:

(xx) the mandate issued in the above-styled case;
( ) the Court's slip opinion;
( ) a certified copy of the Court's order;
(xx) the certified record;
( ) the certified record was never sent to this Court on appeal.

Please acknowledge receipt of the above on the enclosed copy of this letter and return it to this office.

Yours very truly,
John P. Hehman, Clerk

(s) Michelle D. Marr
Deputy Clerk
(Ms.) Michelle D. Marr

The enclosed record consists of 1 vols. pleadings, ____ vols. transcripts, 5 vols. depositions, ____ vols. exhibits.

Name and Title of Authorized Agent
for District Court or NLRB

cc: w/enclosure
Mr. Richard M. Breen
Mr. Allen Dobb, III

No. 86-5447

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DONALD BRAUNER, - - - - *Plaintiff-Appellant,*

v.

MITCH MCCONNELL, Et Al., - *Defendants-Appellees.*

ORDER — Filed March 13, 1987

Before: ENGEL, KRUPANSKY and GUY, Circuit Judges

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

The Court finds that no prejudicial error intervened in the judgment and proceedings in the district court, and it is therefore ORDERED that said judgment be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

(s) Leonard Green
Leonard Green, Chief Deputy

Issued as Mandate: 5/14/87

Cost: none

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 84-0652-L(B)

DONALD BRAUNER - - - - - - - *Plaintiff*

v.

MITCH MCCONNELL, Et Al. - - - *Defendants*

MEMORANDUM — Entered March 25, 1986

Plaintiff, a paraplegic, commenced this action against Jefferson County officials and employees invoking the Court's jurisdiction under Title 42 U.S.C. Section 1983 and Section 504 of the Rehabilitation Act, Title 29 U.S.C. Section 794.

Plaintiff alleges that on August 11, 1983, he was sentenced to 11 months in jail for driving while intoxicated. He was discharged from jail after he was granted "shock" probation. The gravamen of his complaint is that since the Jefferson County Jail where he was confined for about a day-and-a-half and the Community Treatment Center where he served the balance of his sentence are inaccessible to persons with handicaps like or similar to his, he is afforded a remedy under the two statutes set out above. By his second amended complaint,[1] he attempts to assert a pendent state claim under the Kentucky Building Code and, specifically, KRS 196B.260.

The action is a novel one so far as our research has disclosed. The Court has found actions in which handi-

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[1]His first amended complaint added Jefferson County as a party.

capped prisoners are denied access to rehabilitation or vocational services, *Journey* v. *Vitek,* 685 F. 2d 239 (8th Cir. 1982), but we find no case treating the precise issue before the Court.

The Court agrees that Section 504 of the Rehabilitation Act may support a private right of action. See *Pushkin* v. *Regents of University of Colorado,* 658 F. 2d 1372 (10th Cir. 1981). The Court further has no quarrel with the proposition that Section 504 will provide the necessary support for a Section 1983 action. *Id.* at 1382. Our inquiry must go to the applicability of Section 504 to the factual situation before the Court.

The purpose of the Rehabilitation Act is set out in Title 29 U.S.C. Section 701: "The purpose of this chapter is to develop and implement, through research, training, services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent living."

The pertinent language of Title 29 U.S.C. Section 794 reads:

> "No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ."

Throughout all of the authorities the Court has reviewed there runs a common thread of rehabilitation or educational opportunities. The Act itself refers to an "otherwise qualified handicapped individual." A handicapped individual" is defined for purposes of Section 504 as:

"Subject to the second sentence of this subparagraph, the term 'handicapped individual' means, for purposes of subchapters IV and V of this chapter, any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is recarged as having such an impairment. For purposes of sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of *the job in question*. . . ." (Emphasis added.) Title 29 U.S.C. Section 706(7)(B).

The Court concludes that it would do violence to the legislative intent of the Rehabilitation Act to expand it to include involuntary incarceration within the definition of a "program or activity," nor are we willing to hold that a prisoner is an otherwise qualified handicapped individual. The question which immediately leaps to mind is: Otherwise qualified to do what?

The Court finds that Section 504 has no application here. This finding compels the conclusion that plaintiff has not been deprived of any right, privilege or immunity secured by the Constitution and laws. Title 42 U.S.C. Section 1983. Finding no deprivation of any federal right, the Court can reach no conclusion but that plaintiff cannot satisfy the first element set forth is *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 90 S. Ct. 1598 (1970):

"The terms of § 1983 make plain two elements that are necessary for recovery. First, the plaintiff must prove that the defendant has deprived him of a right secured by the 'Constitution and laws' of the United States. Second, the plaintiff must show that the de-

> fendant deprived him of this constitutional right 'under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory.' This second element requires that the plaintiff show that the defendant acted 'under color of law.' " 398 U. S. at 150, 90 S. Ct. at 1604.

The Court determines that defendants' motion for summary judgment should be granted,[2] and plaintiff's motion for summary judgment should be denied. Having reached this decision, the Court declines to accept pendent jurisdiction. See *United Mineworkers of America* v. *Gibbs,* 383 U. S. 715, 86 S. Ct. 1130 (1966).

An appropriate order has been entered this 25th day of March, 1986.

(s) Thomas A. Ballantine, Jr.
United States District Judge

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[2]Defendants' motion is premised on the assertion that the Metropolitan Correctional Services Department receives no federal assistance. This assertion is simply wrong. See Deposition of defendant Richard Frey at page 5.

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 84-0652-L(B)

DONALD BRAUNER - - - - - - - *Plaintiff*

v.

MITCH MCCONNELL, Et Al. - - - *Defendants*

ORDER — Entered March 25, 1986

For the reasons set forth in the memorandum filed this date,

IT IS ORDERED that the motion of the defendants, Mitch McConnell, Darrell Owens, Sylvia Watson, Jim (Pop) Malone, Jefferson County Department of Corrections, Richard Frey, Major John Skowers, Owen Sitgrave, and Jefferson County, Kentucky, for summary judgment on the claim of the plaintiff, Donald Brauner, against them be and hereby is granted.

It is further ORDERED that the motion of the plaintiff for summary judgment on his claim against the defendants be and hereby is denied.

It is further ORDERED that this action be and hereby is dismissed with prejudice.

There is no just reason for delay, and this is a final and appealable order.

This 25th day of March, 1986.

(s) Thomas A. Ballantine, Jr.
United States District Judge

Copies to counsel